

The Top Five 2011

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



United States of America v. Khadr, 2011 ONCA 358

<http://canlii.org/en/on/onca/doc/2011/2011onca358/2011onca358.html>

In this case, the Ontario Court of Appeal (OCA) ruled that an extradition request can be denied if the requesting state has committed clear violations of the human rights of the accused.

Date Released: May 6, 2011

Ruling

The Ontario Court of Appeal ruled that Abdullah Khadr's rights were violated when he was detained in Pakistan and beaten until he cooperated with Pakistani intelligence agents paid by the United States. Given that his human rights were severely interfered with, the court refused to allow extradition to the United States to face terrorism-related criminal charges.

Facts

Abdullah Khadr was born in Canada in 1981, and is a Canadian citizen. During his childhood, he returned several times to Pakistan with his family. His family relocated to Afghanistan by the time of the 2001 coalition invasion of Afghanistan in the aftermath of the terrorist attacks on September 11, 2001. Mr. Khadr's father was associated with Osama Bin Laden, the alleged mastermind of the 9/11 attacks. The family returned to Pakistan sometime after the invasion. The United States alleged that in 2004 and 2005, Mr. Khadr provided Al Qaeda with weapons and explosives to be used against the United States and coalition forces in Afghanistan. For this reason, the U.S. government paid \$500,000 to Pakistan's Inter-Services Intelligence (ISI) to apprehend Mr. Khadr.

Mr. Khadr was then held in secret detention for 14 months, where he was subjected to mistreatment and physical abuse. He was not permitted to speak with a lawyer, nor was he charged with any crime. He was only allowed assistance from the Canadian consulate after three months of detention. During this time, Mr. Khadr was interrogated for the purpose of obtaining intelligence information. In 2005, the ISI decided that Mr. Khadr was no longer a useful intelligence source. Pakistan had no intention of charging him criminally, and asked Canadian officials to do so. Ultimately, the FBI interrogated him in July 2005 in order to advance possible criminal charges in the United States. American authorities requested that Mr. Khadr be taken to the US to face criminal charges. The ISI would not permit it without Canada's permission, which was refused. Mr. Khadr was returned to Canada, where he consented to again being interrogated by the FBI.

Criminal charges were eventually filed in the United States against Mr. Khadr, though he remained in Canada. He was then arrested in Canada. The United States sought to extradite him to face criminal charges in the United States. In other words, they asked permission from Canada to take Mr. Khadr to the United States for a trial. A Canadian judge therefore had to decide whether to permit extradition of Mr. Khadr, given the considerable human rights violations he had suffered. The extradition judge refused to permit extradition and instead granted a stay of proceedings on the basis that to permit them to continue in the face of the requesting state's misconduct would constitute an abuse of the judicial process.

Decision

The Supreme Court of Canada (SCC) had previously decided that a judge can order a stay to prevent an abuse of process if forcing an accused person to stand trial would violate the community's sense of fair play. This discretion can only be exercised in the "clearest of cases". The reason for this rule is that, even if the prosecution of the person is merited, a judge may permit a stay to maintain public confidence in the legal and judicial process. In this case, the Ontario Court of Appeal decided that an extradition judge has the residual power to stay proceedings as that power lies at the heart of the courts' integrity and independence. An extradition judge may grant a stay on these grounds where the requesting state's conduct would taint the court's integrity.

The Court of Appeal also found that this case falls into the "clearest of cases" category. Granting a stay is not only a means of disassociating the court with the requesting state's conduct, it is also a way to deter future similar conduct. The extradition judge's finding that Mr. Khadr's human rights violations were "both shocking and unjustifiable" was sufficient to bring this case into the exceptional category of "clearest" cases.

The Attorney General of Canada argued that the extradition judge did not sufficiently balance the need to prosecute an alleged terrorist against the court's need to disassociate itself from the requesting state's conduct in violating Mr. Khadr's rights. However, the court determined that this sort of balancing is only applicable in cases where it is *unclear* whether the abuse is sufficient to warrant a stay, and a compelling societal interest in having a full hearing could tip the scales in favour of proceeding. Here, the abuse is clear and well established, and no sort of balancing is required under Canadian law. Combating terrorism cannot take priority over fundamental rights and the rule of law. Canada is free to prosecute Mr. Khadr if it so chooses, and thus the argument that an admitted terrorist would walk free is unfounded.

Discussion

1. Which of the abuses of Mr. Khadr's human rights do you find most "shocking" or "unjustifiable", as the court put it?
2. Is public confidence in the justice system a sufficiently important objective to prevent an accused criminal from facing serious charges in other country? Do these objectives conflict, and if so, how?
3. Would a refusal of extradition like this actually deter countries from being party to human rights abuses in the future? In other words, is it likely that the court's decision will influence a country's future conduct?
4. In times of terrorism, should countries be given greater flexibility by courts to protect its citizens? Is there a tension between the rule of law and combating terrorism?